

New Competition Policy in Argentina

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1. Introduction

Competition law in Argentina is going through times of deep transformation since the beginning of 2016 and in less than one year the scenario is very different than the one found until the end of 2015. After many years, Argentina is working hard to return to mainstream with regard to competition enforcement and these changes can be perceived in different fronts.

The change of government in Argentina in December 2015 was a turning point regarding the paradigm of State intervention in the markets and this was translated, among other changes, in the prioritization of competition law enforcement in order to force business to compete more.

These changes have been taken with an unprecedented speed thanks to the combination of various factors, including political will and an existing antitrust community and background which has been forged over many years at the public, private and academic sectors.

2. Background

Argentina is one of the first countries in Latin America to have competition laws. In fact, ever since 1923 Argentina has had anti-monopoly laws (a reform took place in 1943). However, it was in 1980 when Argentina introduced its first comprehensive and modern antitrust regulation (Law No. 22,262). Law No. 22,262 took a less repressive approach and introduced new features, such as the creation of the *Comisión Nacional de Defensa de la Competencia* (“CNDC”), the rule of reason approach to anticompetitive conducts, and the concept of abuse of dominant position.

Since the enactment of Law No. 22,262 until its major reform in September 1999, antitrust enforcement in Argentina was focused exclusively on anticompetitive conducts. With

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the introduction of merger control regulations in Law No. 25,156 of 1999, the CNDC shifted antitrust enforcement mainly towards merger control, with a limited and sporadic cartel activity.

In the meantime, competition law acquired constitutional status through the 1994 amendment to the Argentine Constitution, which in its section 42 states that the federal authorities shall provide for “the defense of competition against any kind of market distortions,” and “the control of natural and legal monopolies.”

Today, Law No. 25,156 governs all competition matters (i.e., cartels, unilateral conducts, and merger control) and its enforcement is vested in the Secretariat of Trade of the Ministry of Production, which is assisted by the CNDC.

During the first 35 years of modern competition law enforcement, but mainly since the 1999 reform, a vast antitrust community of lawyers and economists has been developed at the private, public and academic sectors. Although after the Argentine economic and political crisis of 2002 competition law enforcement was relegated as a political priority and sometimes even strongly misinterpreted, the antitrust community not only survived but it has also grown and strengthened in all areas. The development of this community has been pivotal for the changes that are currently taking place to succeed mainly because his antitrust community has provided many critical human resources for the new government to be able to implement its decision to have a world-class competition regime.

3. New developments

The new government that took office in Argentina in December 2015 from the very beginning made it clear that a sound competition law enforcement was going to be one of its political priorities. Since then various new developments have taken place in the first months of the new administration.

- ***Competition enforcement as a political priority.***

For the first time ever, a President of Argentina announced in its annual speech to Congress that competition law enforcement was going to be one of the political priorities of his administration. When the President of Argentina opened the Congressional sessions on March 1, 2016, he said that one of the goals of the new administration was to “strengthen competition

law enforcement”².

Additionally, in another symbolic gesture, when he appointed the new President of the CNDC there was an oath taking ceremony at the main saloon of the Presidential Palace that was transmitted live on TV and that was witnessed by the entire Cabinet of Ministers and the heads of the Senate and of the Supreme Court. Such a privilege is normally granted only to new ministers and very exceptionally has a lower rank government official received such treatment.

The new government has as its main goal to prioritize the defense of competition as “an instrument to promote consumer welfare and, at the same time, improve productivity and opportunities to enhance economic development ... through the triple P rule: penalise, prevent and promote”³. The 3 P’s stand for: penalising anticompetitive behaviours, preventing concentration, and promoting competition by fostering a competition culture and for establishing pro-competitive regulations.

- *Strengthening of the CNDC.*

In February 2016, Esteban Greco was appointed as the new President of the CNDC. For the first time in over a decade the appointed President has previous antitrust experience and knowledge. Esteban Greco had previously worked at the CNDC first as the Chief Economist and later as Commissioner. Since he left the CNDC he has been a consultant for public and private organizations on competition policy, economic regulation and energy economics. This background allowed him to start the necessary reforms from day one.

Along with him, new commissioners have been appointed. The new CNDC commissioners were chosen by his experience either on the public, private or academic sectors in antitrust or law and economics. The fact that the new team of commissioners were appointed within a very short time frame was helpful in setting up the new team.

In July 2016 a new administrative structure was created by Administrative Decision No. 756/2016 of the Chief of Staff of Ministers of Argentina. This new structure included the creation of directorates for anticompetitive conducts, economic concentrations, legal and economic studies and competition advocacy. The latter is a position that has never existed in Argentina before and it has the challenge of helping create a competition culture in Argentina,

²<http://www.caserosada.gob.ar/informacion/discursos/35651-palabras-del-presidente-mauricio-macri-en-la-134-apertura-de-sesiones-ordinarias-del-congreso>

³ Greco, Esteban M. and Quesada, Lucía – “Argentina: Competition Authority”, The Antitrust Review of the Americas 2017, Global Competition Review, London, 2016, pg. 107.

among other goals.

The CNDC was also empowered to carry-on investigations. By the enactment of Law No. 26,993 in September 2014, the CNDC was totally cleaned of any powers which were totally transferred to the Secretariat of Trade. The CNDC was reduced only to a mere assistant to the Secretariat of Trade with powers only to issue recommendations, opinions, studies and reports, but with no binding effects. Since then, and given that this reform had turned the CNDC into an inoperative body, the Secretariat of Trade issued its Resolution No. 359/2015 granting the CNDC certain investigative powers, though much less powers than the CNDC had before the legal reform of 2014. In July 2016, the Secretariat of Trade issued its Resolution No. 190/2016 replacing Resolution No. 359/2015 and re-established the CNDC with the different powers it historically had.

Lastly, the CNDC also has went through a major internal restructuring of its human resources, hiring new junior and senior economists and lawyers and training them. The training of the new professionals has been handled both internally by senior professionals with strong academic background and also externally through training programs given by either foreign antitrust agencies such as the Federal Trade Commission and the U.S. Department of Justice, or by international organizations such as the World Bank.

- ***Greater international approach.***

The CNDC has substantially changed its international approach in the first months of the new administration. This change reflects the greater government policy of reinserting Argentina in the global scene after years of isolation.

The objective of the CNDC is “to reactivate and increase our links with other agencies as a way to improve our practice and learn from the international experience” since “we can only benefit from sharing methodologies and information with our colleagues around the world, especially as competition cases become increasingly international”⁴.

Within the first months of the new administration, the CNDC has established contacts with its Latin American counter parts, as well as with the agencies of the United States (Federal Trade Commission and Department of Justice), Canada and the European Commission.

The international outreach of the CNDC also included strengthening its relations with

⁴ Greco et al., op.cit., pg. 108.

different international organizations such as the World Bank, the Inter-American Development Bank, UNCTAD and the OECD. This has included, for instance, a training program given by the World Bank to the staff of the CNDC on cartel prosecution in May 2016. In October 2016, the President of the CNDC presided the Group of Experts Meeting organized by UNCTAD in Geneva and in November 2016, the OECD (organization to which Argentina started the negotiations in order to become an active participant of its Competition Committee), held a training programme on competition and public procurement.

The CNDC has also actively participated during 2016 in conferences organized by the Section of Antitrust of the American Bar Association (“ABA”) and by the International Bar Association (“IBA”), events where the CNDC had not participated for many years. Furthermore, the CNDC has expressly requested both organizations for comments to the draft bill reforming the current competition law, even translating the draft bill into English in order to facilitate those comments. In October 2016, both the ABA and the IBA made comments and recommendations for the first time ever to an Argentine antitrust initiative.

- ***New draft bill***

In an unprecedented action, on August 30, 2016, the Argentine Antitrust Commission (“CNDC”) opened a public consultation process for its draft bill reforming its competition law.

The main characteristics of the draft bill include:

- ***Per se hard-core cartels*** – The draft bill establishes that **hard-core cartels are to be considered *per se* unlawful creating an exception to the general rule of reason regime. These conducts would also be considered null.**
- **Reform to the institutional framework** - The creation of an independent agency, the National Competition Authority (the “ANC”), as a decentralized and independent agency within the sphere of the Argentine Government. The ANC’s 5 members would be: a President and 4 commissioners, all of them requiring technical background and suitability. They would have 5 year-terms and can only be removed with certain proper justification.
- **Greater sanctions for anticompetitive conducts** - The implementation of new criteria for the determination of fines, implementing a system based on the business volume of the affected markets, multiplied by the number of years of the duration of the conduct. There would be a limit based on the economic group’s international business volume, taking into account the

previous financial year. Second offences will be subject to a duplication of the fine. The draft bill also eliminates the requirement introduced in 2014 by which the parties had to pay the fines in order to have the right to appeal a fine.

- **Introduction of a Leniency Programme** - The creation of a Leniency Program which would fully exempt from any sanction to the first party that applies for leniency and meets the requirements, and would reduce the fines to those who file later but meet the requirements and provide useful information. The draft bill also contemplates the introduction of a Leniency Plus mechanism by which a party could be benefited in case it provides useful information about another cartel.
- **Changes in merger control** - **The draft bill introduces various changes to the existing merger control system, including** the implementation of a pre-merger control regime; the update and modification of the notification thresholds which were established in pesos in the 1999 reform (since then the peso was devaluated more than 15 times vis-à-vis the U.S. dollar) and the methods used for their calculation; and the introduction of a fast track mechanism for certain transactions.
- **Damages actions** – **The draft bill** allows for damages suits as a consequence of infringements to the competition regulations.
- **Judicial review** - The draft bill would create the National Antitrust Court of Appeals, which would act as the competent court in matters regarding appeals to the ANC's decisions.

On September 27, 2016, the government announced that it would merge its draft bill with the ones prepared by two deputies of the ruling coalition *Cambiamos* (Mario Negri and Elisa Carrió). During the month of October 2016, the joint draft bill was under review introducing also the suggestions received from different organizations both local and foreign. Therefore, by the time this chapter is written, it is not possible to provide a deeper analysis of the new draft bill since it is still under construction.

- ***Competition advocacy***

In April 2016 the CNDC launched eleven market investigations with the objective of assessing the competitiveness conditions in sectors highly concentrated and with significant impact on production and consumption. Markets under investigation included that of milk; meat; laundry detergent; cooking oil; mobile communications; credit cards; air and ground passenger transportation; steel, aluminum; and petrochemicals.

On August 29, 2016, the CNDC released the results of the credit cards and electronic payment methods market investigation (the “CNDC Report”). The CNDC concluded that in the investigated market there is a lack of competition and transparency, with high commissions, a technological delay, and a dominant position held by Prisma Medios de Pago S.A. (Visa Argentina).

As result of the investigation the CNDC Report issued regulatory recommendations to the Central Bank of Argentina and the Secretary of Trade, including the proposal of some amendments to the current Credit Cards Law, in order to guarantee competition and enhance the alternatives of financing commerce and consumers. Additionally, the CNDC Report recommended the Secretary of Trade to initiate an antitrust investigation against Prisma for alleged abuse of dominant position and to its shareholders (14 banks, both private and public) for the existence of an alleged cartel.

According to the CNDC Report, credit cards and electronic payment methods market shows certain concerns as lack of competition in consumption financing, lack of transparency (closed financing cost), high commissions for big shops and technological retardation, as there is an evidenced delay in the introduction of electronic payment methods.

With that purpose, the CNDC Report recommended the Central Bank of Argentina to generate competition in the card acquisition market; to eradicate the restriction to commission differentiation; to promote competition in consumption financing; and to make product prices and financing conditions more transparent.

4. Conclusions

Since the change of government of Argentina in December 2015 there have been many new developments in the area of competition. Competition enforcement has received political support from the highest government officials; the CNDC was completely renovated with professionals with experience in the areas of antitrust or law and economics in the private, public and academic sectors while also receiving back the powers that were taken away in 2014; a more international approach has been taken by the authorities; competition advocacy was introduced in the agenda; and a draft bill reforming the law in order to modernize it was launched.

It is still early to make a proper assessment as to how antitrust enforcement in Argentina will evolve with respect to anticompetitive conducts and merger cases. However, the many

steps already taken on the right direction help foresee the future evolution in an optimistic manner. The new changes added to the vast experience and the existence of a strong antitrust community, is a good combination that will help Argentina to be back as a prominent player in the global competition map sooner than later.